IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL.

Court No.3

Arbitration Application No. 5 of 2003

Ram Bhaj S/o Late Munshi Ram
R/o village and Post Office Maham
District Rohatak Haryana …Applicant.

Vs.

1.Superintending Engineer Eastern Ganga Canal,
Construction Circle Haridwar.

2.Executive Engineer Eastern Ganga Canal
Belwala, Haridwar.

3.The Secretary Irrigation Department,
State of Uttaranchal …Opposite parties.

Hon'ble Irshad Hussain, J.

Heard Sri Sunil Kumar Jain learned counsel for the applicant and Sri N.C.Gupta learned Standing Counsel for the respondent.

2- This is an arbitration application under section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator for the settlement of the disputes between the parties.

3- The applicant was given a contract of earth work in excavation of Eastern Ganga Canal. According to applicant the work was successfully completed and opposite parties were intimated accordingly vide letter dated 6-3-1986. Despite this the final bill of the applicant has not been paid. His 10% security is still being retained by the opposite parties. The applicant requested vide letter dated 25-11-1986, 8-2-1987, 13-4-1987, 10-7-1987 and 28-9-1997 to refer the matter to the arbitrator so that the dispute pertaining to the contract and payment of the final bill etc may be finalized. The opposite parties, however, did not respond favourable and alleged that the contract do not contain any arbitration clause requiring the matter to be refereed to arbitration.

4- The applicant had sent statement of claims to the Superintending Engineer with the request that the payment of the claim be settled and the amount be paid to him. The statement was submitted after October 29th, 1987 in response to the letter of the said date (Annexure No.12 to the notice)

wherein the Chief Engineer had directed that as per I.D. Form-1 1 1 clause-16 the Superintending Engineer is competent to take action in the matter of settlement of claim. The applicant approached the Superintending Engineer who vide his letter dated 13-5-1988 communicated that there is no provision to refer the matter to arbitration and the claims to the applicant are not payable as per clause-16 Form -111 of the contract document. The application therefore gave notice and filed the present application.

5- In the counter affidavit filed on behalf of the respondents it has been averred that the Superintending Engineer had considered the claims of the applicant and finally rejected the same on 13-5-1988 vide communication Annexure C.A.-2 and that after completion of the work of the contract there is no provision to refer any dispute to the arbitrator per clause -16 of I.D. Form-111. It has also been submitted that the claimant can not raise the dispute after about twenty years as the work under the contract was to be completed by 15-5-1982.

6- The question which arise for consideration in this case is-

> "As to whether clause-16 of I.D. Form-111 constitute an agreement that if the dispute arise between the parties to the contract the same shall be referred to arbitrator?"

7- At the out-set it is desirable to reproduce clause -16 of the contract document which is as under:-

> "The Engineer-in-charge shall have power to make such alteration in or additions to be original specifications, drawings designs and instructions as may appear to him to be necessary or advisable during the progress of the work and the contractor shall be bound to carry out the work in accordance with any instructions which may be given to him in writing signed by the Engineer-in-charge, and such alterations shall not invalidate the contract, and any additional work which the contractor may be so directed to do shall be carried out by the contractor on the same conditions in all respects, on which he agreed to do the main work, and at the same rates as are specified in the tender for the main work. The time for the completion of the work, shall be extended in the proportion that the additional work bear to the original contract work and the certified of the Engineer-in-charge shall be conclusive as to such proportion. If the additional work includes any item for which no rate is

specified hereunder, then the contractor shall carry out the work at the rate entered in the Schedule of Rates of the District but if the Schedule does not contain any rate for such work, then the contract shall not begin such work until a rate in respect of such work has been settled by mutual agreement between him and the Engineer-in-charge with the approval of the officer accepting the contract, and if they are unable to agree upon a rate within two weeks from the date when the contractor received the order, the Engineer-in-charge may be a notice in writing cancel the order for such work and carry it out in such manner as he may think best. **In the event of a dispute the decision of the Superintending Engineer shall be final and binding on the contractor."**

8- Referring to the import of the above clause the learned counsel for the applicant argued that intention of the parties was to refer the dispute to arbitration although the tone of the recital of the clause is that the dispute arising between them should be decided by the Superintending Engineer whose decision shall be final and binding. On the other hand the learned Standing Counsel submitted that the tone and tenor of the clause clearly spelt out that in the event of any dispute the matter should not be referred to arbitration but the same should be decided finally and conclusively by the Superintending Engineer and in a situation like this there being no arbitration agreement in existence the instant application for reference of the dispute to arbitration is legally not maintainable and is liable to be dismissed. Drawing attention to Annexure-18 to the petition it was also submitted that the Superintending Engineer vide his letter dated 28-11-1997 communicated to the applicant that there exist no arbitration agreement in clause-16 of I.D. Form-111 and further the applicant's claims after due consideration have been rejected.

9- Attention was also drawn to an earlier letter sent on 13-5-1988 (Annexure No.13 of the petition) by the Superintending Engineer and reference of which has also been made in paragraph No.18 of the petition itself.

10- With reference to the above submissions it is of significance that the applicant has unequivocally reiterated that his final bill has not been paid and security has also not been refunded. There is nothing to indicate that the stand so taken is false. With reference to the above submission it need to be stated that it is well settled that for an arbitration agreement no particular form is

prescribed and intention of parties to refer dispute to arbitration is necessary and sufficient. The decision of the Apex Court in **Smt. Rukmanibai Gupta Vs. Collector, Jabalpur and others; A.I.R. 1981 Supreme Court 479** is an authority which has rightly been relied upon by the learned counsel for the applicant. In a recent decision the Apex Court in the case of **Hythro Power Corporation Ltd. Vs. Delhi Transco Ltd.; 2003 A.I.R. S.C.W. 3867** laid down that designate of Chief Justice under section 11 exercise administrative functions – can not adjudicate upon 'validity and existence of arbitration agreement' and hold that dispute was not referable to arbitration. Relying upon an earlier decision of three Judge Bench of the Apex Court in **Konkan Railway Corporation Ltd. vs. Mehul Construction Company (A.I.R. 2000 S.C. 2821)** an the Constitution Bench Judgment of the Court in **Konkan Railway Corporation Ltd. Vs. Rani Construction Pvt. Ltd. (A.I.R. 2002 S.C. 778),** the ratio that ' arbitral tribunal' to whom the dispute is referred is alone conferred with jurisdiction to decide the existence or validity of the arbitration agreement as provided in section 16(1) of the Act was followed.

11- Further it need to be stated that the decisions of the Apex Court considered in the reported case laid down that the Chief Justice or his designate under section-11 of the Act exercise purely administrative functions and it is not open to him to discharge any judicial function of adjudicating the dispute even regarding the existence of an arbitration agreement.

12- As the thinks stand the above clause of the contract between the parties ex facie indicate the intention of the parties to refer the dispute to arbitration and therefore the present application can safely be said to be legally maintainable.

13- So far as the argument of the learned Standing Counsel that the claim of the applicant is barred by the law of limitation it need to be stated that the final bill has not been paid to the applicant and he had given notice dated 11.1.2003, Annexure No.1 to the petition for referring the dispute to the arbitration and therefore apparently the instant application cannot be said to be barred by time. It is for the arbitrator to deal with the question whether the claim of a party to the arbitration is barred by law of limitation.

14- In view of above I as designate of Chief Justice proceed to appoint an arbitrator under section 11 (6) of the Act.

15- The applicant has proposed four names of arbitrators. No name has been proposed by the respondents. Having considered the broad aspects of the case **Sri P.C. Aggarwal District Judge (Retd.) R/o 143, H.I.G. Flat, Indira Puram, General Mahadev Singh Road, Dehradun** is appointed arbitrator. He should enter upon the reference within 30 days of the receipt of the copy of the order either from the office of the Court or from any of the parties. He would decide the dispute in accordance with the provisions of Arbitration and Conciliation Act, 1996. Unless otherwise agreed by the parties the costs of the arbitration shall be fixed by the arbitrator as provided under the provisions of the Act. The arbitrator shall decide all the questions including the question regarding the existence or validity of the arbitration agreement and other questions arising thereto in regard to the dispute between the parties.

16- The office is directed to send a copy of this order to the arbitrator named above.

(Irshad Hussain, J.)

Dated: 31-10-2003

ISB